NO. 21576

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REGINO BARBA-REYES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, Jr.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in a one-count indictment following trial by jury.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

The one-count indictment alleged that appellant, with intent to defraud

the United States, knowingly concealed, and facilitated the transportation and concealment of, approximately 90 pounds of marihuana, knowing that it had been imported and brought into the United States contrary to law [C. T. 2].[1/]

Jury trial of appellant commenced on May 3, 1966, before United States District Judge James M. Carter [R.T. 2].[2/] Appellant was found guilty as charged on May 4, 1966, and was sentenced upon the same date to the custody of the Attorney General for five years [R.T. 125, 129-30; C. T. 4].

The notice of appeal was not included as part of the record herein.

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

"1. The Trial Court erred in admitting into evidence testimony regarding marijuana found in the car appellant was driving, since the obtaining of the evidence was in violation of appellant's rights under the Fourth Amendment of the United States Constitution (Tr. p. 16).

"2. There was insufficient evidence at the trial to prove beyond a reasonable doubt that the appellant was guilty of the offense charged.

"3. The Trial Court erred in its conduct before the jury by assuming the role of prosecutor (Tr. pp. 72-75)." (Brief of Appellant, p. 3).

1/ "C.T." refers to the Clerk's Transcript.

2/ "R.T." refers to the Reporter's Transcript of Proceedings.

IV

STATEMENT OF THE FACTS

On March 2, 1966, a 1955 Buick automobile arrived at the United States Border Patrol traffic checkpoint 18 miles north of Oceanside, California. The checkpoint involved northbound traffic on Highway 101, a main traffic artery between San Diego and Los Angeles [R.T. 14-15, 23].

Appellant was the driver and sole occupant of the Buick, which was headed in a northerly direction [R.T. 15]. The vehicle was stopped by an officer at the checkpoint. Appellant drove off the roadway as directed, and Immigration and Patrol Inspector Richard E. Dick (who also was an acting Customs Officer) approached and identified himself [R.T. 13-14, 16].

Appellant opened the trunk of the vehicle as directed by Inspector Dick, who detected an odor after the trunk was opened. He did not immediately realize the nature of the odor, although he "had an idea but wasn't certain" [R. T. 19]. As a result, he suspected that there might be packages under the rear seat, and he lifted the rear seat and found some packages and was then "quite sure I knew what it was" [R.T. 18-19].

It was stipulated that the packages weighed approximately 90 pounds and that a qualified chemist examined the packages and discovered that they contained marihuana [R.T. 30-31]. There was testimony as well as a stipulation in regard to the "chain of custody" of the packages [R.T. 16, 21-23, 30-31]. The checkpoint was in San Diego County [R.T. 17].

The marihuana had a selling price of from $1435 to $1640 in Tijuana,

Mexico, and an ultimate estimated street value of $90,000.[3/]

The packages were not visible when the seat was in position [R.T.19-20]. Inspector Dick noticed the odor when he opened the rear door after previously noticing the odor when the trunk was opened. The marihuana odor in the vehicle was also evident to Supervisory Customs Port Investigator George R. Gore, who drove the Buick to Los Angeles with the packages still underneath the seat [R.T. 19, 21-24, 27-28]. Appellant testified that he was acidentally locked out of the Buick during the trip to the checkpoint and had to hammer through a window in order to get inside again [R.T. 33-34]. The odor of marihuana increases as the temperature increases [R.T. 74-75].

Appellant made a number of statements to various officers and eventually confessed that he knew that there was marihuana or some type of drugs or narcotics in the car [R.T. 53, 61, 64].

Appellant employed the "missing man" defense. The "missing man" was said to be "Antonio Rodriguez." Appellant testified that he had known "Rodriguez" in the past in Tijuana, was acquainted with "Rodriguez"'s cousin, Jesus, and accidentally met "Rodriguez" again at the information booth at the Plaza in San Diego on Tuesday. He also testified that "Rodriguez" would

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3/ The Tijuana value was estimated at between $35 and $40 per kilo [R.T. 56]. With 2.2 pounds per kilo, 90 pounds would amount to approximately 41 kilos. The $90,000 figure is based upon an estimate of $1,000 per pound, which is based upon a total of 1,000 cigarettes per pound, selling at $1 per cigarette [R.T. 57].

stay at a cousin's home when he went to Tijuana [R.T. 34, 40-41, 43]. Investigator Gore testified that appellant had previously stated that the meeting in question between appellant and "Rodriguez" occurred on a bus [R.T. 53].[4/]

Appellant testified that "Rodriguez" was of medium height and weighed around 150 or 160 pounds, although appellant was not certain of the weight [R.T. 37]. Two officers testified that appellant had stated to them in separate interviews that "Rodriguez" was approximately six feet tall and weighed approximately 200 pounds [R.T. 53, 56, 61, 63]. Appellant denied having made the statement concerning 200 pounds [R.T. 42].

Appellant also testified that "Rodriguez" told him that his car was out of order, that he had to buy another car for transportation, and that he gave appellant $30 as well as an offer to obtain work for him in return for appellant's act of driving the second car from San Diego to Los Angeles, about 125 miles [R.T. 34, 38-39]. Two officers from different agencies testified that appellant stated during separate interviews that "Rodriguez" promised to pay $50 for the trip, of which $30 was to be paid in advance [R.T. 53-54, 61-62]. Appellant denied having made this statement [R.T. 38].

Appellant testified that he separated from "Rodriguez" after the Tuesday encounter and took the bus to Tijuana after agreeing to meet on the following day, when appellant would tell "Rodriguez" whether he would take the car. He also testified that he met "Rodriguez" on the following day at Twelfth and

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4/ Appellant referred to the Tuesday before the arrest, and Gore referred to March 1. The latter date, March 1, 1966, was the Tuesday before the arrest of appellant on March 2.

Market, which was about 15 blocks from the Plaza [R.T. 44-47]. Investigator Gore testified that appellant had stated that he met "Rodriguez" at the Plaza on that date (March 2) and that they walked about four blocks to the Buick [R.T. 54].

Appellant testified that "Rodriguez" told him to deliver the vehicle near a large guilding on the right side of Bixel Street in Los Angeles after following the specified route [R.T. 36, 48]. Two officers testified that appellant had stated that the large building was on the left side of the street [R.T. 55, 63].

Appellant testified that "Rodriguez" gave him a diagram showing directions; that he, appellant, had the diagram with a map on the seat of the Buick during the trip, and that he did not remember what had happened to the diagram [R.T. 47-48]. Inspector Dick testified that he made an additional search of the vehicle after finding the packages and found no diagram [R.T. 69].

Appellant impliedly conceded that he told Inspector Dick that his address was in Chula Vista, California. Appellant actually lived in Tijuana and Mexicali. He testified that the Chula Vista address was his mother's address and his own mailing address [R.T. 49-50].

Appellant admitted that he had had two felony convictions. He testified that he did not observe a strange odor in the vehicle [R.T. 50].

V

ARGUMENT

A. ADMISSION OF EVIDENCE OBTAINED BY SEARCH OF A VEHICLE DID NOT CONSTITUTE "PLAIN ERROR."

Although there was no objection in the trial Court to the admission of

evidence obtained by search of the Buick and there was no adversary hearing in the trial Court to present evidence upon which the trial Court or this appellate Court could make a ruling upon the matter, appellant now contends, for the first time, that the trial Court erred in admitting the evidence without objection.

By the time that the evidence was offered, appellant had already waived any Fourth Amendment objection by failing to make the motion to suppress after indictment, there being no extenuating circumstances.

Sandez v. United States, 239 F.2d 239, 242 (9th Cir. 1956), citing Segurola v. United States, 275 U. S. 106 (1927).

Appellant's position is somewhat less secure than that of the unsuccessful litigants in Segurola , for he not only failed to raise the issue prior to trial as required by Rule 41(e) of the Federal Rules of Criminal Procedure, but he also failed to make the motion during trial. (The trial Court has discretion to hear the belated motion under Rule 41, but appellant asks this Court to rule upon the merits, in the absence of a hearing, where the trial Court has not yet had the opportunity to rule upon the preliminary question, which is whether the belated motion should be entertained if it is ever filed.)

The basic difficulty in appellant's position is the fact that an appellate Court cannot be satisfied that all of the evidence is before it when there was no need to present evidence at trial because the question was not before the trial Court.

It is too late to raise a search and seizure question, for the first time, on appeal.

Stein v. United States, 166 F.2d 851, 855 (9th Cir. 1948).

It has been suggested that there might be an exception to this rule in cases of "plain error affecting substantial rights" under Rule 52(b), Federal Rules of Criminal Procedure.

Ramirez v. United States, 294 F.2d 277, 282 (9th Cir. 1961).

However, in Billeci v. United States, [5/] 290 F.2d 628, 629 (9th Cir. 1961), this Court held that introduction of unlawfully-seized evidence would not constitute plain error under Rule 52(b) because the admission of the evidence does not affect the "'fairness, integrity, or public reputation' of the proceedings below." The opinion noted that the purpose of the exclusionary rule is to discourage overzealous law enforcement officers. The Court added that the "failure to proceed in accordance with Rule 41(e) prevents this court from now considering this claimed error." (at p. 629).

Appellant places considerable emphasis upon his conclusion that "there was no testimony that officer Dick was familiar with such [marihuana] odors."

(Brief of Appellant, p. 8).

This statement provides an excellent example of the defects in the suggested rule that would permit litigation of questions upon appeal when the evidence has not been heard in the trial court, for the records of this Court show that Inspector Dick had previously discovered a huge load, consisting of 204 pounds of marihuana, on March 10, 1964.

Diaz-Rosendo v. United States, 357 F.2d 124 (9th Cir. 1966).

Had his opinion of the nature of the odor been one of the issues in the trial

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5/ Cited in Sanchez v. United States, 311 F.2d 327, n.5 at p.330 (9th Cir. 1962).

Court, evidence may well have been available. While he testified that he "had an idea but wasn't certain" [R.T. 19], he was not asked concerning the strength of his opinion.[6/] This was not in issue.

While it was suggested in Bouchard v. United States, 344 F.2d 872, 875 (9th Cir. 1965), that failure to object in the trial court does not preclude consideration of the Fourth Amendment question upon appeal where "good cause" is shown for the failure to object, it is apparent that a claim of incompetent counsel is based solely upon the fact that counsel failed to move to suppress evidence, there is no showing of "good cause," unless all defendants are to be permitted to raise innumerable new issues upon appeal by merely claiming incompetency of trial counsel.

Although there is good authority in support of the proposition that "ineffective assistance of counsel is not likely to be tolerated as a backdoor for arguing

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6/ Of course, probable cause would not require absolute certainty. There is good reason to believe that Inspector Dick had probable cause to believe that contraband was concealed when he "had an idea" concerning the source of the odor and suspected that there might be packages under the rear seat [R.T. 18-19]. At any rate, the case is not sufficiently clear to fall within the confines of "plain error," which must be "'clearly or plainly apparent'" and "can be seen at the first glance without search or study."

Percifield v. United States, 241 F.2d 225, 228 (9th Cir. 1957).

search and seizure claims,[7] appellant seeks to belatedly raise the search and seizure issue by claiming incompetency of counsel.

He asserts that the "Failure of appointed counsel to research and be familiar with rules of evidence relating to search and seizure . . . ." was fundamentally unfair.

(Brief of Appellant, p. 5).

However, there is no evidence that appellant's counsel failed to engage in research or failed to become familiar with the rules. He may have decided that the seizure was lawful, that a motion to suppress would be unmeritorious and time-consuming, and that it would be tactically advantageous to refrain from making the motion. His thought processes and tactical decisions are not included in the record upon appeal, since the question of competency of counsel has not been the subject of an evidentiary hearing in the trial Court (e.g., by possible motion under 28 U.S.C.A. 2255).

It is possible that appellant's counsel read 8 U.S.C.A. 1357, which authorizes searches, by Immigration officers without warrants, of any vehicle within a reasonable distance from any external boundary of the United States. He may have noted that the statute contains no requirement of reasonable cause or probable cause for the search and also that there is a "strong presumption of constitutionality due to an Act of Congress . . . ."[8] He may have considered the opinion in Haerr v. United States, 240 F.2d 533, 535 (5th Cir. 1957), in

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[7] Thornton v. United States, 368 F.2d 822, 827, n. 9 (C.A.D.C. 1966)

[8] United States v. Di Re, 332 U.S. 581, 585 (1948).

which the Court of Appeals unanimously held that immigration officers may stop and search vehicles and that "Such a procedure might reasonably involve examination of any personal property in their possession as well as all parts of the car including the trunk." While it is true that this language was considered to be dictum in this Court's opinion in Contreras v. United States, 291 F.2d 63, 66 (9th Cir. 1961), the question is not whether the search was lawful but whether appellant's counsel was incompetent. If he had read Haerr and was not aware of the analysis of Haerr in Contreras, would he thereby become incompetent? If so, there would be few competent attorneys.

Appellant's counsel may have considered other decisions upholding the authority of immigration officers to search vehicles, portions of vehicles, or other personal property.

Kelly v. United States, 197 F.2d 162 (5th Cir. 1952) (vehicle);

Renteria-Medina v. United States, 346 F.2d 853 (9th Cir. 1965) (notebook);

People v. Jennings, 231 Cal. App. 2d 744 (1965) (vehicle trunk).

In view of these decisions, it is respectfully submitted that appeallant is incorrect when he states that the matter was handled "cavalierly" by his counsel and that he "reduced the trial to a farce or sham . . . ." (Brief of Appellant, pp. 5-6).

Appellant cites Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962). Brubaker does not involve a Fourth Amendment question. It involves a habeas corpus proceeding, thus permitting a hearing upon the question of competency of counsel, allowing a proper presentation of the facts to the appellate court. In Brubaker, this Court stated (at p. 37):

"This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right. Due process does not require 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'"

t is respectfully submitted that this test was met herein and that appellant has not satisfied the burden of showing that his counsel was "'so incompetent or inefficient as to make the trial a farce or a mockery of justice.'"

Bouchard v. United States, supra, 344 F.2d 872, 874, quoting from Reid v. United States, 334 F.2d 915 (9th Cir. 1964) (Emphasis added). Appellant has not shown that the trial was a "'mockery of justice, shocking to the conscience of the court.'"

Dodd v. United States, 321 F.2d 240, 243 (9th Cir. 1963), quoting from Washington v. United States, 297 F.2d 342 (9th Cir. 1961).

"An accused cannot bring about a judicial evaluation of the quality of a defense; he is entitled only to allege and show that the proceeding was not a fair trial."

Mitchell v. United States, 259 F.2d 787, 794 (C.A.D.C. 1958). Appellant has not satisfied this burden.

Appellant also cites People v. Ibarra, 60 C. 2d 460 (1963), in which counsel demonstrated that he was unfamiliar with a rule that "should be a commonplace to any attorney engaged in criminal trials." (at p. 465). A highly-sophisticated argument regarding the extent of permissible immigration

earches, or the sufficiency of the evidence to demonstrate probable cause to elieve that contraband is being concealed, or the question whether consent o search was an "informed" consent (Brief of Appellant, p. 7), can hardly be escribed as a matter of "commonplaces."

Furthermore, this Court is not required to follow the state court decision n Ibarra, and it is respectfully submitted that it is not desirable to brand defense counsel with incompetency whenever they fail to navigate the "quagmire f 'searches and seizures'" [9/] in the exact fashion that subsequent appellate ounsel would require, particularly where there is no evidence concerning the easoning behind the decisions of trial counsel.

Appellant's assertion that his counsel was incompetent is similar to the nsuccessful Fourth Amendment claims of appellants in other Federal cases.

Sheridan v. United States, 264 F.2d 236, 237 (5th Cir. 1959), cert. lenied, 359 U.S. 997 (1959);

Kapsalis v. United States, 345 F.2d 392, 394 (7th Cir. 1965), cert. lenied, 382 U.S. 946 (1965);

Way v. United States, 276 F.2d 912, 913 (10th Cir. 1960).

Here, as in Way (at p. 913), defense counsel "may have had adequate eason for failing to raise these points." (The points included a Fourth Amendment claim).

It should be noted that in this case, as in Bouchard, supra, at p. 875,

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9/ The language is from Davis v. United States, 327 F.2d 301, 302 (9th Cir. 1964).

the trial Judge commended appellant's counsel at the conclusion of the trial. Judge Carter stated:

"I want to compliment Mr. McCarty for his defense in this matter. I think he did a very good job with what he had to work with." [R.T. 128].

There is a presumption of competency of counsel.

Achtien v. Dowd, 117 F.2d 989, 992 (7th Cir. 1941).

In conclusion, it is respectfully submitted that appellant has not rebutted the presumption of competency of counsel; that there has been no demonstration that the search in question was unlawful; that the trial was not "a farce or a mockery of justice" and was not "shocking to the conscience of the court"; that this was not a case of "plain error," which must be "'clearly or plainly apparent'"; and that the decisions in Billeci, Sheridan, Kapsalis, and Way, supra, are controlling in this case.

B. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION

Appellant contends that the evidence was insufficient to sustain the conviction, although the evidence is much stronger than the evidence in Aguilar v. United States, 363 F.2d 379 (9th Cir. 1966), a similar case involving a huge load of marihuana and the "missing man" defense. The conviction in Aguilar was affirmed. This Court noted (at p. 381) that "This is not a de minimis quantity case where incidence of error in finding knowledge would be high."

In the instant case, appellant's second version of the events, related

at trial, was only slightly less incredible than his first, chiefly because he scaled down the amount of the alleged offer to drive the old car about 125 miles, reducing the figure from an absurd $50 to a remarkable $30 for what must be slightly over two hours' work.

Although appellant supposedly believed that the transaction was innocent, he admitted to the officers that the missing man told him to park the car "after dark but before dawn. . . ." [R.T. 63], and he testified that he broke a window of the vehicle with a hammer during the trip [R.T. 33-34], which not only indicates that all of the windows were closed but also demonstrates remarkable behavior by an allegedly innocent man, who would normally refer to a locksmith or repairman under these circumstances, unless he feared that the strong odor of marihuana would be detected.

Appellant claimed that the missing man needed to buy the vehicle in question because his other car was out of order, and yet the missing man was going to transport the disabled vehicle to Los Angeles and arrive there before appellant did so [R.T. 34-36] .

Furthermore, in view of the fact that appellant confessed to one officer and admitted that he knew that there was marihuana or some type of drugs or narcotics in the car [R.T. 64], it is not necessary to discuss at length some of the other major weaknesses in his defense, including the strong odor of marihuana in the vehicle; the failure of appellant to produce a single witness who knew that the missing "Rodriguez" actually existed, although appellant supposedly was acquainted with Jesus, the cousin of "Rodriguez" [R.T. 40]; the general lack of credibility in the testimony of appellant, who had two

felony convictions [R.T. 50]; the disappearance of the alleged diagram [R.T. 47-48, 59, 69]; and the numerous major inconsistencies in appellant's two versions of the events.

The latter inconsistencies included the statement that appellant was promised $50 and the later testimony that he was promised $30 [R.T. 38, 54, 62]; the statement that he met "Rodriguez" on the bus on the first day, and the testimony that the meeting was at the information booth at the Plaza [R.T. 43, 53]; the statement that he met "Rodriguez" at the Plaza on the second occasion, and the testimony that the meeting was about 15 blocks from the Plaza [R.T. 46-47, 54]; the statement that "Rodriguez" was approximately six feet tall and weighed approximately 200 pounds, and the testimony that Rodriguez" was of medium height and weighed about 150 or 160 pounds [R.T. 57, 56, 63]; the inconsistency in the description of the location of the place of delivery on Bixel Street [R.T. 36, 55, 63]; and the false address apparently given to Inspector Dick [R.T. 49-50].

Appellant complains that the officers did not attempt to make a delivery of the marihuana to "Rodriguez." However, appellant had admitted that he had committed an escape in the past [R.T. 68], so it would have been foolish for the officers to provide an opportunity for another escape with an automobile.

C. THE CLAIM THAT THE TRIAL COURT ASSUMED THE ROLE OF PROSECUTOR CANNOT BE RAISED IN THIS APPEAL.

Appellant asserts that the trial Judge committed error "by assuming the role of prosecutor" during the trial. Since no objection was made in the trial

Court, appellant is precluded from raising the new issue in this appeal. Issues must be raised in a timely fashion in the trial Court.

Ramirez v. United States, supra, 294 F.2d 277, 283;

Stein v. United States, supra, 166 F.2d 851, 855.

While there may be an exception to this rule in cases of "plain error," it is respectfully submitted that this is not a case of "plain error."

D. ASSUMING ARGUENDO THAT APPELLANT MAY NOW RAISE THE NEW ISSUE OF THE CONDUCT OF THE COURT, NO ERROR WAS COMMITTED IN THIS REGARD.

Assuming arguendo that appellant may now raise the new issue concerning the conduct of the trial Court, it is respectfully submitted that the comments of the trial Judge were neither erroneous nor prejudicial to the defense.

While the trial Court indicated that additional evidence should be presented upon the question of the possible existence of marihuana odor, this suggestion did not constitute error. "It cannot be too often repeated, or too strongly emphasized, that the function of a federal trial judge is not that of an umpire or of a moderator at a town meeting. He sits to see that justice is done in the cases heard before him; and it is his duty to see that a case on trial is presented in such way as to be understood by the jury, as well as by himself. He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help or hurt one side or the other." (Emphasis added).

Simon v. United States, 123 F.2d 80, 83 (4th Cir. 1941).

The suggested testimony may have helped to avoid a jury inference harmful to appellant, because the witness testified, in response to a question by the trial Judge, that the strength of the odor of marihuana rises as the temperature rises [R.T. 75]. The trial commenced on May 3, normally a warm day. If the jurors noticed the odor of the marihuana in the courtroom on a day in May, they may have considered the probability that the defendant noticed the odor on March 2 (normally a much cooler day). This would have been damaging to appellant's case, had not the information elicited the unfair effect of jury ignorance concerning the temperature effects.

Appellant quotes United States v. Carengella, 198 F.2d 3, 8 (7th Cir. 1952). The complete quotation from Carengella states in part that

"'It is of course the duty of the trial judge to conduct the trial in an orderly way with a view to eliciting the truth and to attaining justice between the parties . . . ." (Emphasis added). The conviction of Carengella was affirmed.

Appellant's claim that the testimony was "highly damaging to appellant" (Brief of Appellant, p. 11) is quite difficult to reconcile with his claim that the evidence was insufficient.

However, in view of appellant's confession, as well as the strong evidence in regard to the odor (already before the jury at the time of the questioning by the trial Court), it is respectfully submitted that any error in this regard would constitute harmless error.

Carengella, supra, at p. 8.

"A defendant is entitled to a fair trial but not a perfect one."

Lutwak v. United States, 344 U.S. 604, 619 (1953).

Appellant refers to a number of examples of an alleged judicial attitude avoring the prosecution. (Brief of Appellant, p. 10). It is difficult to attach uch significance to these matters. In fact, the trial Court provided appellant ith a very significant potential tactical advantage by allowing him to intro- uce his hearsay self-serving statement over objection, without requiring that ppellant testify and submit to cross-examination [R.T. 25-26].

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment f the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.
United States Attorney

PHILLIP W. JOHNSON
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have mined Rules 18, 19 and 39 of the United States Court of Appeals for the th Circuit, and that, in my opinion, the foregoing brief is in full com- nce with those rules.

Phillip W. Johnson
by
Joseph A. Milch